IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

TUESDAY, THE 31ST JULY 2007 / 9TH SRAVANA 1929

CRL.A.No. 1325 of 2006()

SC.36/2005 ofADDL.SESSIONS JUDGE (ADHOC-II0, ERNAKULAM
CP.68/2004 of JUDL.MAGISTRATE OF FIRST CLASS-II, ERNAKULAM

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APPELLANTS:

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1. MOHANAN, AGED 39, S/O.KUNJUMON,
   ROHINI NIVASAN NEAR DEVI THEATRE,
   PACHALAM, ERNAKULAM.

2. NADHEER, AGED 52,
   S/O.KUNJU, HOUSE NO.CC.4/65, PUTHIYA ROAD
   BHAGOM, MATTANCHERY.

BY ADV. SRI.C.P.UDAYABHANU

RESPONDENTS: COMPLAINANT

STATE OF KERALA, REPRESENTED BY
THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. PUZHAKKARA MUHAMMED

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 31/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. THANKAPPAN, J.

CRL.A.NO. 1325 OF 2006

Dated this the 31st day of July, 2007.

JUDGMENT

The appellants faced trial for the offences punishable under Section 55(a) read with Section 55(i) of the Abkari Act along with the 3rd accused on the allegation that they were found in possession of 7 and 12 bottles of Indian made foreign liquor respectively on 6.12.2003 and 7.12.2003 in contravention of the Act or Rules framed thereunder. To prove the charge against the appellants, prosecution examined 7 witnesses and relied on Exts.P1 to P14. After the prosecution evidence, the appellants were questioned under Section 313 of the Code of Criminal Procedure. They denied the charge leveled against them. However, the trial court found the appellants guilty under Section 55(a) of the Abkari Act and convicted them thereunder and sentenced to undergo R.I for two years each and to pay fine of Rs.One lakh each with default sentence of payment of the fine, to undergo S.I for a further period of six months each. The trial court also allowed the benefit of Section 428 of Cr.P.C to the appellants. The judgment of the trial court is challenged in this

appeal.

2. Heard Sri.C.P. Udayabhanu, the learned counsel appearing for the appellants and the Public Prosecutor. The learned counsel appearing for the appellants had taken the following contentions before this Court in challenging the judgment of the trial court. Firstly it is contented by the counsel that framing of the charge against the appellants and the other accused in the crime and trial of the accused in a joint trial are against the provisions of Section 218 of the Code of Criminal Procedure and hence, the trial itself is vitiated. Secondly, it is contended that even if the entire evidence adduced by the prosecution is accepted, the finding of the trial court that the appellants have committed the offence punishable under Section 55(a) of the Abkari Act is not legally sustainable as the prosecution had failed to prove that the contraband articles seized from the appellants are in connection with transport, export or import of the substances as contemplated under Section 55(a) of the Abkari Act. To substantiate this contention, the learned counsel placed reliance on two judgments of this Court reported in **Surendran v. Excise Inspector** (2004 (1) KLT 404) and **Sudephan @ Aniyan v. State of Kerala** (2005(2) KLD Crl. 631). Thirdly, it is contended that the evidence adduced by the prosecution that the appellants were

found in possession of the contraband article as alleged by the prosecution was not established by cogent and legal evidence as Pws 1 to 5, who were examined before the court to prove the alleged seizure made by Pws 6 and 7, turned hostile to the prosecution and not supporting the case of Pws 6 and 7. Lastly, the counsel for the appellants submitted that the evidence of Pws 6 and 7, who were the detecting officers of the crime, cannot be accepted as their investigation is not in accordance with the provisions of the Code of Criminal procedure and as they have seized the contrabands from two different persons namely the present appellants, from two different places and at two different dates under different mahazers without registering separate case for their separate seizure. Before considering the contentions raised by the learned counsel appearing for the appellants, it is advantageous to see the brief facts of the prosecution case alleged against the appellants. The specific case as revealed from the charge framed by the court below is that the 1st accused in Crime No.892/2003 of the Central Police Station, Ernakulam, has been found in possession of 7 bottles of Indian made foreign liquor labeled with the State Beverages Corporation named as Peters Port XXX Rum in the night of 6.12.2003 at 11.35 at Ernakulam Market Road – Jews Street Junction in front of S.D.

Pharmacy and the 1st accused was questioned by PW6 – the Sub Inspector of Police, Central Police Station and on questioning him it was revealed that the Indian made foreign liquor was brought by him on a scooter and on further questioning, the accused had admitted that he had no license or permit to possess the contraband articles beyond the permissible limits. Hence, the contraband articles were seized by PW6 on preparing Ext.P1 seizure mahazar in the presence of some of the independent witnesses. Subsequently, he was arrested and a case was registered against him and F.I.R was also sent which reached the court on 7.12.2003 itself. The further case against the appellants is that after arresting the 1st accused in the above crime, further investigation of the case has been continued by PW7- the Sub Inspector and on questioning the 1st accused in the above crime, it was revealed that if the 1st accused was taken to the High Court jetty, he would show that a man is waiting there with a card board box having liquors in it. So, on the basis of that statement, the 1st accused was taken by PW7, another Sub Inspector and at that time when the 1st accused and PW7 were present in the boat jetty, the 2nd accused came with a cardboard box which contained 12 bottles of Indian made foreign liquor and on preparing Ext.P4 seizure mahazar, the above bottles

were seized. In the statement given by A1 and A2, those bottles were given to them by A3 and A3 was also made an accused in the same crime. Subsequently, the house of A3 was also raided but nothing was seized from his house. Hence, after completing the investigation, final charge has been filed before the court. Crime No.892/2003 was registered against A1, A2 and A3 and another F.I.R was send to the court. Apart from the F.I.R already sent to the court on the same crime number on the next day namely on 8.12.2003, the trial court after taking into consideration of the two F.I.Rs and the prosecution allegation, framed the charge as was seen from the court charge and they were faced trial. The trial court after considering the entire evidence found that the 3rd accused has not committed any offence, hence he was acquitted. However, the present appellants were convicted as aforesaid. The first contention of the learned counsel appearing for the appellants is that framing of the charge against three accused in the same crime is irregular and illegal and trial itself is vitiated. As per Section 218 of the Code of Criminal Procedure, it is specifically stated that, for every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately. Admittedly, Crime No.892/2003 has been registered only against A1

in the case and another F.I.R has already been sent to the court on 8.12.2003 on the same crime. If so, the addition of the accused Nos.2 and 3 in the above crime is without permission of the court and without giving even an additional report to the court. If so, the question to be considered is whether that procedure is correct or not. Admittedly, two sets of contraband were seized by two officers on two different dates and from two different persons and on different occasions and on different mahazers. This second seizure cannot be considered as a recover made under Section 27 recovery. If so, framing of the final charge is not correct and it is an irregularity. A joint trial is contemplated under Section 223 of the Code if more than one person is accused of the same offence committed in the course of the same transaction. However, even if the trial and charge are not in accordance with the code, the findings entered by the trial court cannot be set aside as the charge was not challenged at the initial stage or the trial stage. So, that question is answered accordingly. The second question raised by the learned counsel is that even if the evidence of prosecution witnesses has been accepted, the finding of the court that the appellants have committed the offence punishable under Section 55 (a) is not justifiable. In this context, the facts of the case would reveal that

both the appellants were found in possession of 7 and 12 bottles of Indian made foreign liquor without any permit or license as contemplated under the provisions of the Abkari Act or the Rules framed thereunder. If so, the prosecution should prove that they were found in possession of the contraband article in connection with transport or import of the same. But the prosecution had not pleaded it or established that they appellants were found in possession of the contraband article in connection with any of the action contemplated under Section 55 (a) of the Act. This question was considered by this Court in a Division Bench decision reported in **Surendran v. Excise Inspector (2004 (1) KLT 404)** wherein this Court had held that possession of a contraband article not in connection with transport, export or transit will not constitute an offence under Section 55(a) of the Act, whereas at the maximum it may be construed as an offence coming under Section 58 of the Abkari Act. This dictum was followed by a learned Single Judge of this court in **Sudephan's case(**cited supra) where the learned Judge held that to constitute an offence under Section 55(a) of the Abkari Act the prosecution must allege and prove that such possession was incidental or in connection with export, import, transport or transit of liquor. The facts of the case in hand would not

prove that the prosecution has not produced any evidence to show that the contraband articles seized from the appellants were in connection with any of the actions contemplated under Section 55 (a) of the Act. Hence, the finding of the court that appellants have committed the offence punishable under Section 55(a) of the Act is not justifiable. Even if the act committed by the appellants would not coming under Section 55(a) of the Act, it is contended by the Prosecutor that the offence may come under Section 63 of the Abkari Act as the appellants were found in possession of Indian made foreign liquor beyond the quantity prescribed by the Government as per the notification issued under Sections 10 and 13 of the Abkari Act. Submission of the Prosecutor shall be considered later on analysing the evidence. The next question raised in the appeal is regarding the evidence adduced by the prosecution to prove the case against the appellants. The prosecution had examined 7 witnesses out of whom Pws 1 to 5 were the independent witnesses for proving alleged seizures made by Pws 6 and 7 – the Sub Inspectors of Police. The evidence of Pws 6 and 7 has to be considered in the light of the finding that registration of the crime against the appellants and the other accused itself is irregular and not in accordance with the provisions of the Cr.P.C. If so, their evidence regarding seizures

of the contraband article from the appellants has to be considered in the light of the other evidence adduced by the prosecution. In this context, Pws 1 to 5 were examined to prove that the appellants were found in possession of the contraband articles (Mos 1 and 2) as alleged by the prosecution. But none of these witnesses supported the prosecution case at all. Some of these witnesses had stated that they had not even signed the mahazers and some other though admitted the signature, they said that they did so only as asked by the police without knowing what had written in it. If so, the evidence of Pws 6 and 7 is not enough to prove the case against the appellants. There is no legal bar to prove or to base the prosecution case on the evidence adduced by an investigating officer, if his evidence is free from any such infirmity. Here, this Court see that the evidence of these witnesses is doubtful and not giving confidence as they have given evidence before the court without following the procedure prescribed in the Code of Criminal procedure for even registering the crime and the provision of Evidence Act for recording the statement alleged to have been given by the 1st accused, the first appellant herein. In this context, PW7 had stated that after registration of the crime against the 1st accused, PW6 had sent FIR to the court and thereafter PW7 questioned the 1st

accused. If arrest is not made by PW7, any statement given by the 1st accused in the case by PW7 cannot be taken as a statement which led to recovery of any article from the 2nd accused. The interesting evidence in this case is that as per the statement given by the 1st accused, 2nd seizure has been made from the 2nd accused. This Court is not in a position to find that such statement can be treated as a statement for recovering anything unconnected with crime registered against A1. If so, any statement given by A1 cannot be used against the 2nd accused namely the 2nd appellant. With the above infirmity in the evidence of these witnesses and non supporting of the evidence by any independent witnesses, the prosecution had not succeeded in proving that the appellants were found in possession of the contraband article as charged before the court.

In the light of the discussions made in this judgment, this Court is of the view that the appellants have not even committed any offence punishable either under Section 63 or 58 of the Abkari Act in violation of any Rules or notifications issued by the Government in the possession of Indian made foreign liquor. In the above circumstance, the judgment of the trial court is set aside and the

appeal is allowed. The appellants are acquitted of all the charges. The bail bonds executed by the appellants stand canceled. If the appellants have deposited any amount pursuant to the order passed by this Court, that amount shall be returned to them as per law.

K. THANKAPPAN, JUDGE.

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